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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

BUILDERS' ASSOCIATION OF KANSAS CITY,
Petitioner,

vs.

GREATER KANSAS CITY LABORERS DISTRICT COUNCIL OF THE INTERNATIONAL HOD CARRIERS BUILDING AND COMMON LABORERS UNION OF AMERICA OF GREATER KANSAS CITY AND VICINITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

HARRY L. BROWNE,
HOWARD F. SACHS,
1000 Power & Light Building,
Kansas City, Missouri, 64105
Counsel for Petitioner.

SPENCER, FANE, BRITT & BROWNE,
Kansas City, Missouri,
STANFORD C. MADDEN,
906 Grand Avenue,
Kansas City, Missouri,
Of Counsel.

E. L. MIDDLEHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Opinions Below 2
Jurisdiction 2
Questions Presented 2
Statutes Involved 3
Statement 4
Reasons for Granting the Writ 6
Conclusion 12

Appendix—

Original Opinion of District Court—213 F. Supp. 429 ..... A1
Opinion of Court of Appeals—326 F.2d 867 ..... A16
Judgment of the Court of Appeals A21
Order Denying Petition of Appellant for a Rehearing A21
Order Staying Issuance of Mandate A22
Section 320, Labor Management Relations Act of 1947, As Amended; 29 U.S.C., Section 186; 61 Stat. 157; 73 Stat. 537 ..... A22

Citations

CASES—

Atkinson v. *Sinclair Refining Company*, 370 U.S. 238 (1962) 10-11
Boston Printing Pressmen's Union v. *Potter Press*, D.C. Mass., 141 F. Supp. 553 (1956) 7
Boston Printing Pressmen's Union v. *Potter Press*, 1 Cir., 241 F.2d 787 (1957), cert. den. 335 U.S. 817 7
Copra v. *Suro*, 1 Cir., 236 F.2d 107 (1956) 12
Holmberg v. *Armbrecht*, 327 U.S. 392 (1946) 12
Johnson v. *Yellow Cab Transit Co.*, 321 U.S. 383 (1944) 12

Livingston v. *John Wiley & Sons*, 2 Cir., 313 F.2d 52 (1963) 7
Local Union 998, etc., v. *B. & T. Metals Co.*, 6 Cir., 315 F.2d 432 (1963) 11
M., K. & O. Transit Lines, Inc., v. *Division 892, Amalgamated Association, etc.*, 10 Cir., 319 F.2d 488 (1963) 7
Parks v. *I.B.E.W.*, 4 Cir., 314 F.2d 886 (1963) 7
Timken Roller Bearing Co. v. *N.L.R.B.*, 6 Cir., 325 F.2d 746 (1963) 11
United Steelworkers v. *Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960) 10
In re Valencia Baxt Express, Inc., D.C. P.R., 199 F. Supp. 103 (1961) 7

STATUTES—

Section 301(a), Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C., Section 185(a) 3, 4
Section 302, Labor Management Relations Act of 1947, As Amended, 61 Stat. 157, 73 Stat. 537, 29 U.S.C., Section 186 ..... 3, 4, 11

MISCELLANEOUS—

"Quasi-Legislative Arbitration Agreements," 64 Columbia Law Review 109 (January, 1964) 7, 11

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Builders' Association of Kansas City prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on January 23, 1964.

CITATIONS TO OPINIONS BELOW

A memorandum opinion of the District Judge, ruling on petitioner's motion to dismiss and stating reasons for entering judgment for respondent, is reported in 213 F. Supp. 429, and is printed in the Appendix hereto, *infra*, p. A1. A further opinion and final order of the District Judge is reported in 217 F. Supp. 1, and appears as part of the printed record, nine copies of which have been filed herein, beginning at R. 59.

The opinion of the Court of Appeals is reported in 326 F.2d 867, and is printed in the Appendix hereto, *infra*, p. A16.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1964. Appendix, p. A21, *infra*. Rehearing was denied on February 28, 1964, Appendix, p. A22, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether United States District Courts have equity jurisdiction or authority to grant specific enforcement of arbitration clauses in collective bargaining agreements under which creative or quasi-legislative arbitration of new contracts is sought.

2. Whether, in construing the intent of the parties respecting arbitrability, Federal Courts must follow a presumption of arbitrability even when quasi-legislative arbitration of new contracts is sought, or are directed to deny

such arbitration when the procedural provisions of the arbitration clause limit arbitration to the processing of individual grievances, and do not pertain to disputes between employers and unions.

3. Whether the doctrine of "unclean hands" bars equitable enforcement by Federal Courts of an arbitration demand under a collective bargaining agreement, when the demand sought to be arbitrated seeks an illegal result; *i.e.*, contributions by employers to a welfare fund in which they do not share administration, as required by Federal statute.

STATUTES INVOLVED

A statutory provision involved is Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. Section 185(a), which provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

An additional statutory provision involved, in connection with the Third Question Presented, is Section 302 of the Labor Management Relations Act of 1947, as amended, 61 Stat. 157, 73 Stat. 537, 29 U.S.C., Section 186. This section is set out verbatim in the Appendix, *infra*, p. A22. It prohibits, in part, the payment by an employer to a welfare fund unless "the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers

are equally represented in the administration of such fund. . . ." 29 U.S.C., Section 186(c)(5)(B).

STATEMENT

Suit was filed in the District Court by respondent labor organization, to obtain an order requiring petitioner, an organization representing employers, to submit to arbitration the creation of a new agreement respecting a health and welfare insurance program (R. 1-3). Respondent alleged that petitioner had refused to submit the creation of such a program to arbitration, in alleged violation of an earlier agreement between the parties; and averred that the District Court had jurisdiction to grant the relief prayed, under Section 301 of the Labor Management Relations Act of 1947 (R. 2-3).

After overruling of a motion to dismiss, based essentially on the first two questions here presented (R. 4), the parties stipulated the following facts (R. 7-14): Respondent, a District Council, composed of delegates from affiliated locals, entered into collective bargaining agreement with petitioner on June 16, 1960 (R. 7-9). In the 1960 agreement it was agreed, among other things, that effective April 1, 1962, contributions by employers would be made under "a health and welfare insurance program in accordance with a Trust Agreement to be agreed upon between the parties" (R. 33). Beginning in January, 1962, negotiations relative to the welfare provisions began (R. 10-11). The District Council permitted petitioner to negotiate directly with the locals (R. 11), in accordance with some past practice (R. 9). In April, 1962, an agreement was entered into between petitioner and the locals (R. 11), and the plan there agreed to is now actively functioning (R. 13). Members of petitioner are making

contributions on employees covered by the 1960 agreement (R. 13).

Respondent District Council contends the locals are not authorized to make binding contracts with petitioner (R. 9) and insists that all contributions made pursuant to the above-quoted general commitment in the 1960 agreement be paid into an existing fund in Jefferson City, Missouri (R. 11), in the administration of which petitioner's members have no representation (R. 11-12).

Several months after welfare agreements were entered into with the locals, respondent demanded that a new welfare program be created by arbitration (R. 42, 43). Respondent filed suit in State Court to prevent consummation of the agreements with the locals (R. 45), which suit resulted in a judgment in favor of petitioner and the intervening locals (R. 58-9). Thereafter, this suit was filed by respondent, to compel arbitration creating a new welfare program.

The arbitration clause in the 1960 agreement upon which suit was based, provides: "There shall be no stoppage of work on account of any differences which may occur between a member or members of the Association and the Union. If the matter cannot be adjusted between the parties involved, it shall be taken up between a representative of the Union and a representative of the Association. . ." and shall thereafter be processed through arbitration (Article IX, R. 33). The 1960 contract also provides: "Should the Steward and the Contractor or the Contractor's representative be unable to adjust any grievance, dispute or complaint without delay, the Steward shall immediately notify the Business Representative of the Union (who) shall then attempt to adjust the grievance, dispute or complaint." (Article V(1), R. 33).

The arbitration provisions in the 1960 agreement were carried over from an earlier contract (R. 10). In negotiations, there was no discussion of whether the arbitration clause would be applicable to the creation of a health and welfare program (R. 10).

In granting judgment for respondent, the Courts below invoked a presumption in favor of arbitrability, and held the parties "intended" to submit to creative arbitration a disagreement between themselves as to a health and welfare program, despite the foregoing language of the arbitration clause, indicating an intent to submit to arbitration only the grievances of individuals, which could not be "adjusted between the parties involved" or at a higher level. 213 F. Supp. 429, 432-3; Appendix pp. A6-7; 217 F. Supp. 1, 3-4; R. 62-4; 326 F.2d 867, 869; Appendix p. A19.

After finding that the parties "intended" to submit to creative arbitration, the Courts below held that Federal Courts have equity jurisdiction to force such arbitration, and expressly rejected the contrary rule existing in the First Circuit. 213 F. Supp. 429, 435; Appendix p. A12; 326 F.2d 867, 870; Appendix p. A21.

The District Court refused to apply the "clean hands" doctrine, holding that even if respondent was seeking a violation of Federal law, it was nevertheless entitled to arbitration of the question. 217 F. Supp. 1, 9; R. 71-2. The Court of Appeals likewise failed to rule on the legality of respondent's demand.

REASONS FOR GRANTING THE WRIT

1. The major public concern in this litigation is in resolving a conflict between the Circuits on an important, recurring question of Federal equity jurisdiction in labor cases.

This case presents in sharp focus a question repeatedly presented to the Federal Courts since 1956. In January of this year, a comment in a leading law review stated that "agreements to arbitrate the provisions of a new or renewed contract not only have been opposed by both labor and management, but also have been held unenforceable by the courts." "Quasi-Legislative Arbitration Agreements," 64 Columbia Law Review 109, citing the District Court decision below as representing a minority view. Until this litigation, the only line of authority on the issue was based on litigation decided in 1956 by Judge Wyzanski, whose opinion was subsequently affirmed by the Court of Appeals for the First Circuit. *Boston Printing Pressmen's Union* v. *Potter Press*, D.C. Mass., 141 F. Supp. 553, affirmed 1 Cir., 241 F.2d 787 (1957), cert. denied 335 U.S. 817. The views there expressed are considered binding today in the First Circuit. *In re Valencia Baxt Express, Inc.*, D.C. P.R., 199 F. Supp. 103 (1961). Three other Courts of Appeals have considered the issue here involved, but have been able to avoid decision. *Livingston* v. *John Wiley & Sons*, 2 Cir., 313 F.2d 52, 60 (1963); *Parks* v. *I.B.E.W.*, 4 Cir., 314 F.2d 886, 909, note 34 (1963); *M. K. & O. Transit Lines, Inc.*, v. *Division 892, Amalgamated Association, etc.*, 10 Cir., 319 F.2d 488, 490 (1963). It is submitted that the considered view of the First Circuit should now be accepted or rejected by this Court in order to lay to rest an important, recurring issue.

The nature of the issue has never been better expressed than in the original opinion of Judge Wyzanski. In that case (141 F. Supp. 553), the Court was presented the question of judicial enforceability of an agreement to submit to arbitration the creation of a new contract to govern employment conditions at defendant's plant. For the convenience of the Court, petitioner excerpts at length from the opinion:

"In short, the Court is asked to direct what may conveniently be described as a *prospective* or *quasi-legislative* arbitration establishing future labor conditions not *specifically* envisaged in their earlier contract. This is, at least with respect to industrial labor problems, a novel problem not hereto adjudicated by a federal court acting under the asserted authority of Section 301 of the Taft-Hartley Labor Management Relations Act of 1947 . . . (l.c. 554).

". . . (I)t (would not) be sound for this Court to conclude that *all* kinds of arbitration under collective bargaining contracts, *quasi-judicial* as well as *quasi-legislative*, *retrospective* as well as *prospective*, fall outside the permissible ambit of (Federal judicial enforcement). . . . However, nothing decided by the Court of Appeals in the *General Electric* case (232 F.2d 85—thereafter affirmed, 353 U.S. 547) disposes of defendant's contention that there is no constitutional or statutory warrant for enforcement of the particular type of arbitration provision here at stake —a provision admittedly having chiefly a prospective or quasi-legislative impact to govern, or establish the rules for, future labor relations between the parties. . . .

"But even if it be assumed that the Constitution authorizes Congress to confer upon Article III Courts the power to enforce quasi-legislative arbitral awards pursuant to collective bargains: there remains the question whether Congress has done so (l.c. 556).

"Legislation specifically addressed to this problem does not exist. Nothing in the text or history of the Taft-Hartley Act speaks on this precise subject. When in 1925 the first version, and in 1947 the second version, of the United States Arbitration Act were enacted Congress did not explicitly or impliedly cover this point. The whole structure of these enactments is obviously concerned with quasi-judicial, not quasi-legislative disputes. Each section is on the assumption that what is dealt with is the ordinary, not the

extraordinary, grist of the judicial mill (citing) (l.c. 556-7).

"Furthermore, the problems of quasi-legislative arbitral awards have generally been thought by state courts to be beyond the intended reach of a judicially enforceable arbitration statute, unless, at any rate, the legislature spoke clearly in favor of the widest possible interpretation (citing). . . .

"Perhaps more important than the considerations heretofore stated is the point that this controversy deals not merely with a prospective quasi-legislative arbitral award, but with an award in the delicate area of labor relations. This is to be sure not technically an example of an orthodox attempt at 'compulsory arbitration.' Yet it comes, in substance, perilously close. . . . Moreover, the national representatives of employers and employees who were faced with the Taft-Hartley Bill, and the legislators who enacted it, are not shown to have adverted to the possibility that Section 301 . . . would make judicially enforceable provisions such as Article 17 of the contract now at bar. . . .

"So many doubts are stirred that a court would do well to move warily . . . this Court deems it undesirable to jump into what may be a bottomless pit of dispute over future working conditions: Perhaps on reflection, no one would be happy to have judges again exercising quasi-legislative magistracy over labor problems of uncertain dimension.

"In any event, if the Courts are to go into the field of quasi-legislative labor awards let the representatives of the workers, the representatives of the employers, and above all the representatives of the people make themselves first heard in the halls of Congress. It would be unsound for a judge to rely upon the haphazard chances of litigation where counsel represent discrete parties not general partisan interests, and where the judge, not being informed of the legis-

lative will, may tend arbitrarily to over-accentuate his particular parochial experience . . . (l.c. 557)."

In response to this statement of reasons for avoiding unauthorized assumption of jurisdiction over *creative* arbitration, the Courts below summarily speculated that subsequent "teachings of the Supreme Court" render the First Circuit rule "far too weak a peg upon which to hang a reversal" (326 F.2d 867, 870; Appendix, *infra*, p. A21. See also Appendix p. A12).

Since none of the decisions of this Court deal with creative or quasi-legislative labor arbitration, it is difficult to understand the inference drawn below that a Federal court having jurisdiction over quasi-judicial arbitration must have like jurisdiction over quasi-legislative arbitration. Such an assumption ignores entirely the rationale of Judge Wyzanski's opinion and of the opinion of the Court of Appeals for the First Circuit, holding that the question of quasi-legislative jurisdiction "differs radically" from the question of quasi-judicial jurisdiction (241 F.2d 787, 789).

It is respectfully submitted that the conflict between the Circuits on this important issue should be settled in the case at bar.

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2. A secondary, but significant, reason for granting a writ is to correct a plain error below in construing the arbitration clause. In attempting to follow certain directions of this Court in quasi-judicial cases to resolve all doubts in favor of arbitration (*United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 582-3 (1960)), the Courts below neglected to follow a method of construction subsequently used in this Court, whereby general language relating to arbitration has been restricted in light of arbitration procedures showing limitation on the availability of remedies. Thus, in *Atkinson v. Sinclair*

Refining Company, 370 U.S. 238, 241-3 (1962), the Court examined the entire contract to determine arbitrability and held that the employer was not a party who could invoke arbitration. Thereafter, relying on *Atkinson*, the Court of Appeals for the Sixth Circuit held that controversies originating between a union and the employer were not arbitrable, where analysis of the arbitration procedures showed that only individual grievances were to be processed thereunder. *Local Union No. 998, etc.*, v. *B. & T. Metals Co.*, 315 F.2d 432, 437 (1963); *Timken Roller Bearing Co.* v. *N.L.R.B.*, 6 Cir., 325 F.2d 746, 751-3 (1963).

The case at bar would clearly be ruled in the Sixth Circuit in favor of petitioner. The arbitration clause here deals with "differences" between union and association *members*, not between the union and the association as such (R. 33). Only after a dispute cannot be adjusted "between the parties involved" is it considered by union and association representatives (R. 33). It is apparent that any method of construction looking to the procedures preliminary to arbitration would require the conclusion that the present dispute, originating between respondent and petitioner, is not within the arbitration clause.

It is further submitted that there was plain error in relying on a presumption that the parties intended arbitrability when the controversy at bar would require creative arbitration, notoriously "opposed by both labor and management". 64 Columbia Law Review 109, *supra*.

3. Finally, it is submitted that there was plain error in refusing to rule on the important question, whether the illegality of respondent's demand, under 29 U.S.C., Section 186(c)(5)(B) bars granting of relief in equity. Neither Court below decided whether employer members of petitioner could lawfully contribute to a fund administered by representatives of another employer association.

(A similar issue would be raised if petitioner were insisting that respondent accept the administration of another or rival labor organization. See *Copra v. Suro*, 1 Cir., 236 F. 2d 107, 116 (1956).)

Recognizing that a Federal District Court should not, preliminary to arbitration, ordinarily make a judgment on the "merits" of a controversy; the present issue of illegality poses a question within the Court's peculiar expertise. Moreover, no labor legislation heretofore enacted repeals the normal requirement of a court of equity that a plaintiff with "unclean hands" is not entitled to judicial assistance.

Conscience and good faith have always been required of litigants seeking to invoke the equity jurisdiction of the Federal courts. *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). "A plaintiff who seeks to invoke (Federal judicial) power for the purpose of consummating a transaction in clear violation of the law" cannot expect assistance from the Federal courts. *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944). Mr. Justice Frankfurter, disagreeing on the circumstances of the case, wrote (l.c. 402), "where the relief sought is . . . the very means . . . for completing an outlawed transaction, a court of equity should withhold its aid and not become the promoter of wrongdoing."

It is submitted that the Courts below committed serious error in ordering arbitration of an illegal demand.

CONCLUSION

It is respectfully submitted that a writ of certiorari should be granted, to resolve a conflict between the Circuits on an important question of Federal equity juris-

diction to order "creative" arbitration of new labor agreements. Further, the case at bar contains important questions, for determination by this Court, respecting the rules of construction for arbitration clauses in labor agreements and respecting the defense of illegality when judicial enforcement of an arbitration demand is sought.

Respectfully submitted,

HARRY L. BROWNE,
HOWARD F. SACHS,
1000 Power & Light Building,
Kansas City, Missouri 64105
Counsel for Petitioner.

SPENCER, FANE, BRITT & BROWNE,
Kansas City, Missouri,
STANFORD C. MADDEN,
906 Grand Avenue,
Kansas City, Missouri,
Of Counsel.

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